respondents when imposing the various sentences. As I have said, she has not considered that 4-digit lotteries, which are rife in the State, should be contained in the public interest. Had she done so or if her attention had been drawn to this factor, she would probably impose much heavier fines on the respondents and certainly would not have invoked s. 294 of the Criminal Procedure Code in binding over one of them for good behaviour. In my view, having regard to the public interest, the nature of the offences, its mode of commission, the background, character and antecedents of the respondents I would consider the fines imposed on the 1st, 2nd and 4th respondents and the binding over order on the 3rd respondent to be manifestly inadequate in all the circumstances. I shall therefore substitute the sentences as follows, namely, that the respondents be each incacerated for a period of 1 day in His Majesty's Prison and a fine of RM1,000 in default 1 month imprisonment.

As regards the returned exhibits P5, P8, P16 and P19, these were seized by the police in connection with the offence. They were found in the room or rooms where the illegal 4-digit operation was going on. This must clearly suggest that they were used for the purpose of the operation. There is nothing to indicate or suggest that the exhibits in question belonged to any of the respondents who, on the admitted facts, were apparently mere employees in the operation. They are more likely to belong to the operators, the kingpins behind the scene. The learned Magistrate did not appear to have considered all these factors. In the circumstances, the order to return the exhibits P5, P8, P16 and P19 is quite wrong and should be reversed. They are to be forfeited to the Government.

For all the reasons given and to the extent stated, this appeal is allowed.

RED AND YELLOW OMNIBUS CO. SDN. BHD. & ANOR.

v.

CHUAH LAY BOON

HIGH COURT, TAIPING
DATO HJ. ABDUL MALIK B.
HJ. ISHAK JC
[CIVIL APPEAL NO. 12-3-92 (91)]
18 FEBRUARY 1993

TORT: Road accident - Appeal against quantum - Damages awarded for injuries not pleaded - Whether permissible.

PRACTICE & PROCEDURE: Injury not pleaded in statement of claim - Trial Court awarding damages in respect of injuries not pleaded - Whether damages recoverable - Medical reports forming part of agreed bundle of documents - Whether dispenses with proof of existence or execution of document - Whether dispenses with proof of contents of document.

The appellants admitted liability for negligence in the trial Court but appealed against the damages awarded to the respondent for injuries to the left little finger on the grounds that the said injuries were not pleaded in the statement of claim. The appellant also sought to set aside the award for partial loss of future earnings.

Held:

[1] In a motor accident claim where negligence is proved or admitted, a plaintiff is entitled to be awarded damages only in respect of injuries which are pleaded and which are proved or admitted to have been caused by the negligence of the defendant.

[2] The injury to the left little finger is nowhere pleaded in the respondent's statement of claim and the respondent was not entitled to damages for this injury.

[3] The respondent was below 30 years of age at the time of the accident and the trial Court was right in awarding a multiplier of 16 for the loss of future earnings. There was nothing on record to justify reversing the award of the trial Court under this head of damages.

[4] Once a document is included in an agreed bundle it is no longer necessary to prove its existence or execution nor is it necessary to produce the original. The truth of the contents

of the document has to be proved in the absence of any specific admission of the facts contained therein.

[Order accordingly. Costs to the respondent].

Cases referred to:
*Ngooi Ku Siong & Anor v. Aidi Abdullah [1985] 1 MLJ 30 FC / [1984] 2 CLJ 163 (**refd**)*
*Chin Boon Keng v. Sri Jaya Transport Co. (PTM) Ltd. & Anor. [1965] 2 MLJ 239 (**refd**)*
*Seow Gek Soo alias Yeo Gek Soo v. Chia Mun Fook [1989] 1 CLJ 985 (**refd**)*
*S.N. Rajah & Anor. v. Tan Hock Seng [1965] 1 MLJ xviii (**refd**)*
*Topaiwah v. Salleh [1968] 1 MLJ 284 (**refd**)*
*Rasidin bin Partorjo v. Frederick Kiai [1976] 1 MLJ 214 FC (**refd**)*
*Lim Eng Kay v. Jaafar [1982] 2 MLJ 156 FC / [1982] CLJ 298 (**refd**)*
*Pang Ah Chee v. Chong Kwee Sang [1985] 1 MLJ 153 FC / [1985] 2 CLJ 221 (**refd**)*
*United Plywood & Sawmill Ltd. v. Lock Ngan Loi [1970] 2 MLJ 237 (**refd**)*
*Nordin bin Haji Abdul Wahab v. Mohamed Salleh bin Hassan [1986] 2 MLJ 294 SC (**refd**)*
*Henry Trading Co. Ltd. v. Harun [1966] 2 MLJ 281 (**refd**)*
*Yap Choo Hoo v. Tahir bin Yasin [1970] 2 MLJ 138 (**refd**)*
*Goh Ya Tian v. Tan Song Gou & Ors. [1981] 2 MLJ 317 (**refd**)*
*Anjalai Ammal & Anor. v. Abdul Kareem [1969] 1 MLJ 22 FC (**refd**)*
*Lew Voon Kong & Anor. v. Mustafa bin Kamis [1978] 2 MLJ 217 FC (**refd**)*
*Hj. Mohd. Dom v. Sakiman [1956] 22 MLJ 45 (**refd**)*
*Miskinah bte Jaya & Ors. v. Mohamed bin Salleh & Anor. [1984] 1 MLJ 187 / [1983] 2 CLJ 267 (**refd**)*
*Siti Aishah binti Ibrahim v. Goh Cheng Hwai [1982] 2 CLJ 544 (**foll**)*
*Menah binti Sulong @ Minah binti Sulong @ Aminah binti Sulong v. Lim Soo & Anor. [1983] 1 CLJ 26 FC (**foll**)*
*Esso Petroleum Co. Ltd. v. Southport Corporation [1956] AC 218 HL (**refd**)*
*Mahan Singh v. Govt. of Malaysia [1973] 2 MLJ 149 (**refd**)*
*Yahaya bin Mohamad v. Chin Tuan Nam [1975] 2 MLJ 117 PC (**refd**)*
*Hitam bin Abdullah & Anor. v. Kok Foong Yee [1974] 1 MLJ 193 FC (**refd**)*
*Uval & Anor. v. Zainal [1970] 1 MLJ 74 FC (**refd**)*
*Jeremiah v. Lee Yew Kwai [1966] 1 MLJ 59 PC (**refd**)*
*Ong Kim Hai v. Kusaini bin Surip [1984] 2 MLJ 285 FC / [1984] 2 CLJ 281 (**refd**)*
*Murugan v. Lew Chu Cheong [1980] 2 MLJ 139 FC (**refd**)*

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(d)(i)
EPF Act 1951, Third Schedule

For the appellants - Nawal binti Harun; M/s. Gan Teik Chee & Co.
For the respondent - L. Fernandez; M/s. L. Fernandez & Co.

JUDGMENT

Hj. Abdul Malik b. Hj Ishak JC:
This is an appeal against the quantum of damages awarded by the Sessions Court, Taiping, Perak ("the trialCourt"). The trial Court awarded RM39,478 altogether being (1) RM478 special damages and (2) RM39,000 general damages.

The general damages are made up of the following items:

(1) RM9,000 **for permanent laxity** of the posterior cruxiate ligament as well as the medial collateral ligament **of the left knee**. (for pain & suffering and loss of amenities).
(2) RM6,000 for **permanent incapacity of the left little finger** resulting in a permanent loss of sensation over the medial aspect. (for pain & suffering and loss of amenities).
(3) RM4,800 for total loss of earnings (pretrial loss).
(4) RM19,200 for partial loss of future earnings.

There is no complaint against the awards in respect of (1) and (3) but in regard to (2) and (4) the appellants complain. There is no appeal on liability for negligence which was fully admitted by the appellants in the Court below.

> *Permanent incapacity of the left little finger resulting in a permanent loss of sensation over the medial aspect.*

In assessing damages under this head the trial Court considered the three medical reports, one dated 1 April 1986 from the district hospital, Taiping (see page 5 of the appeal record) and the other two came from Hospital Lam Wah Ee dated 7 November 1989 (see page 28 of the appeal record) and 23 April 1989 (not enclosed in the appeal record) respectively. These three medical reports have been agreed upon and consequently they formed part and parcel of the agreed bundle. The trial Court also considered the police report lodged by the respondent (see page 15 of the appeal record). The trial Court made an award of RM6,000 under this head which was thought to be

reasonable without taking into account comparable cases. It appears that the trial Court must have snapped the figure from the air. This mode of assessing damages may result in speculation and was frowned upon by the Federal Court in the case of *Ngooi Ku Siong & Anor v. Aidi Abdullah* [1985] 1 MLJ 30 FC. The Federal Court in that case held that it was not proper for the learned Judge to discard the authorities and use her own experience in assessing the damages. The award of general damages should be in line with a discernible trend or pattern of awards in reasonably comparable cases. (*Chin Boon Keng v. Sri Jaya Transport Co. (PTM) Ltd. & Anor.* [1965] 2 MLJ 239.) As a comparable is the case of *Seow Gek Soo alias Yeo Gek Soo v. Chia Mun Fook* [1989] 1 CLJ 985 where for chip fracture of the proximal phalange of left index finger, Abdul Malek Ahmad J. awarded RM4,500. In *S.N. Rajah & Anor. v. Tan Hock Seng* [1965] 1 MLJ xviii Ismail Khan J (as he then was) awarded RM3,000 for the little finger that curved up and was useless. Thus, the award by the trial Court under this head would in the circumstances be appropriate (an injury of a permanent nature), subject of course to the outcome of this appeal as discussed below.

Certain principles which are well established need to be emphasised in an appeal on quantum of damages. The appeal Court would be slow to interfere with the trial Court's finding unless (1) there has been a wholly erroneous estimate of damage, or (2) the trial Court has omitted some relevant consideration or admitted some irrelevant consideration, or (3) the amount is so excessive or insufficient, as to be plainly erroneous. The appeal Court should avoid interfering merely because it thinks that if the case had been before it in the first instance, it would have awarded a lesser sum.

Azmi CJ (Malaya) (as he then was) in the case of *Topaiwah v. Salleh* [1968] 1 MLJ 284 had this to say:

> ... so far as this Court is concerned we should, to paraphrase Greer LJ in *Flint v. Lovell* [1935] 1 KB 354 be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the Courts have made over the years form some guide to the kind of figure which is proper and which the appellate Court will follow in the light of the special facts of each particular case.

Wan Suleiman FJ (as he then was) in the case of *Rasidin bin Partorjo v. Frederick Kiai* [1976] 1 MLJ 214 FC said that:

> Thus the appellant here has to convince us that the learned trial judge has acted on a wrong principle of law, or has misapprehended the facts, or has for other reasons made a wholly erroneous estimate of the damage suffered.

Salleh Abas FJ (as he then was) in the case of *Lim Eng Kay v. Jaafar* [1982] 2 MLJ 156 FC emphasized that:

> Thus the judicial warnings against the size of award quoted above cannot be construed as laying down a new principle for assessing damages, but are merely intended to serve as a caution, lest the Court might be moved by sympathy for an injured person to giving a higher award than would have been otherwise justified by evidence. The proper approach which we will adopt in this case is therefore to avoid conjecturing into the unchartered sphere of public policy and to confine ourselves merely to the examination of the award in order to see whether its assessment is perverse or whether it was arrived at on an incorrect principle.

Hashim Yeop A. Sani FJ (as he then was) in the case of *Pang Ah Chee v. Chong Kwee Sang* [1985] 1 MLJ 153 FC had this to say:

> In such assessment there is generally ample room for individual choice to arrive at a fair and reasonable figure and the appellate Court is always slow to reverse the trial judge's decision on such assessment unless there are strong grounds of interference.

Gill FJ (as he then was) in the case of *United Plywood & Sawmill Ltd. v. Lock Ngan Loi* [1970] 2 MLJ 237 explained the principle clearly when he said:

> The general principle is that an appellate Court can only interfere with an assessment if it is considered so inordinately low or inordinately high as to make the Court exclaim, "Good gracious, is that the sum which has been awarded - that sum must be altered", or it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate.

Finally, Hashim Yeop A. Sani SCJ (as he then was) in *Nordin bin Haji Abdul Wahab v. Mohamed Salleh bin Hassan* [1986] 2 MLJ 294 SC categorically stated:

> We are aware of the special difficulty in an appeal against quantum. The finding that a trial Judge has erred in the direction of being too generous would not by itself constitute a matter to be appealed from and the appellate Court is always slow to reverse the trial Judge's decision on assessment of damages unless there are strong grounds for interference.

Suffice it for me to say that if the appeal Court is satisfied or convinced that the trial Court has acted upon wrong principles of law then it is justified in reversing; indeed, the appeal Court is then duty bound to reverse the finding of the trial Court.

Now, reverting to the instant appeal.

Cik Nawal binti Harun, Counsel for the appellants, contended that the statement of claim did not incorporate the injury under this head and therefore the trial Court ought not to have made such an award. She submitted further that the injury under this head was not mentioned in the medical report of the district hospital Taiping dated 1 April 1986.

Encik L. Fernandez, Counsel for the respondent , contended, quite rightly, that the injury under this head was categorically stated in the medical report of Hospital Lam Wah Ee dated 7 November 1989 to this effect:

> Clinical examination of her left little finger revealed that there was a loss of sensation over the medial aspect. There was also evidence of huge laceration over the base of her left little finger medially.

He submitted further that this medical report (dated 7 November 1989) was the report prepared by Hospital Lam Wah Ee for the appellants and tendered in the Agreed Bundle of Documents and therefore the appellants cannot now be heard to say that they would not be bound by it. It was also submitted that the appellants failed to cross-examine the respondent in regard to the injury under this head when she gave evidence in the Court below. It was further submitted that the respondent's evidence in regard to the injury under this head went unchallenged. In reply, Cik Nawal submitted that though the medical report of Hospital Lam Wah Ee dated 7 November 1989 was incorporated in the Agreed Bundle of Documents, its contents were not proved. The doctor who prepared the report was also not called. It is understandable that some confusion/misunderstanding could have arisen as a result of the conflicting decisions on the effect of an Agreed Bundle of Documents. In *Henry Trading Co. Ltd. v. Harun* [1966] 2 MLJ 281 Wan Sulaiman J. (as he then was) held that where there is an Agreed Bundle of Documents it is not necessary to prove those documents. Whereas in *Yap Choo Hoo v. Tahir bin Yasin* [1970] 2 MLJ 138 Sharma J (as he then was) held that a document even when forming part of the Agreed Bundle of Documents has to be proved, although it need not be formally and strictly proved. Next is the case of *Goh Ya Tian v. Tan Song Gou & Ors.* [1981] 2 MLJ 317 where Lai Kew Chai J. held that the documents in an Agreed Bundle were admitted into evidence by consent without production of the maker or the originals and the contents formed part of the evidence before the Court.

I am of the view that two issues are involved here:

(1) whether agreeing to a document dispenses with proof of its existence or execution?
(2) whether agreeing to a document dispenses with proof of the contents of the documents?

It is established law that once a document is included in an Agreed Bundle, it is no longer necessary to prove its existence or execution and it is not necessary to produce the original. But in my considered view in so far as the contents of the documents are concerned the truth of the same has still to be proved, in the absence of any specific admission of the facts therein contained. This argument can be fully appreciated if one considers the two police reports at pages 14 and 15 of the Agreed Bundle of Documents where the words "subject to cross-examination" were boldly typed. This means that the version of the accident is not agreed upon and is in issue. Thus, to this extent the makers of the two police reports may be subject to cross-examination to establish the truth of the matter. Likewise the doctor that prepared the medical report dated 7 November 1989 from Hospital Lam Wah Ee may also be subject to cross-examination to establish the injury under this head.

The trial Court considered the police report lodged by the respondent especially that part which said that: "saya dapat cedera di tangan ..." and concluded that infact the respondent sustained the injury under this head.

Looking at the statement of claim (pg 5 of the appeal record) it is clear that the injury under this head was not pleaded. Learned Counsel for the respondent sought to justify this error by saying that when the statement of claim was drafted it was based entirely on the medical report of the district hospital, Taiping dated 1 April 1986, which report was silent in regard to the injury under this head.

Now it has been stated time and again that where the trial Court had departed from the strict rules of procedure in deciding a case on an issue not raised in the pleadings the appeal will be allowed (see *Anjalai Ammal & Anor. v. Abdul Kareem* [1969] 1 MLJ 22 FC). The respondent's evidence in Court must tally with her averments in the pleadings and should not run counter to it (see *Lew Voon Kong & Anor. v. Mustafa bin Kamis* [1978] 2 MLJ 217 FC and *Hj. Mohd. Dom v. Sakiman* [1956] 22 MLJ 45). The respondent, in short, must be bound by her pleadings (see *Miskinah bte Jaya & Ors. v. Mohamed bin Salleh & Anor.* [1984] 1 MLJ 187, in the Federal Court case of *Siti Aishah binti Ibrahim v. Goh Cheng Hwai* [1982] 2 CLJ 544 his Lordship Abdul Hamid FJ (as he then was) referred to the case of *Menah binti Sulong @ Minah binti Sulong @ Aminah binti Sulong v. Lim Soo & Anor.* [1983] 1 CLJ 26 FC as authority for the proposition that a decision should be in strict accordance with the pleadings. Lord Normand in *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] AC 218 HL had this to say:

> The function of the pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. (see page 238).
>
> I wish to associate myself with the observations of my noble and learned friend, Lord Radcliffe, on the value of pleadings. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. (see page 239).

It is my considered view, in a motor accident claim where negligence is proved or admitted (as in the instant appeal), a plaintiff is entitled to be awarded damages only in respect of injuries which are pleaded and which are proved or admitted, to have been caused by the negligence of the defendant. In the instant appeal, the injury to the left little finger which appears to be permanent in nature resulting in a permanent loss of sensation., is nowhere pleaded in the respondent's statement of claim. Although there was recourse for the respondent in the Court below to amend the statement of claim, this opportunity was never resorted to by the respondent. It must be borne in mind that generally leave is given to amend the pleadings even at the hearing although the Court does not readily allow such amendments if the necessity for such amendments should have been abundantly apparent much earlier but was not asked for. In the instant appeal, had the respondent applied to amend the statement of claim in the Court below, I am positive that the trial Court would have allowed the amendment subject to the necessary costs and provided no prejudice was incurred by the appellant. (see *Mahan Singh v. Govt. of Malaysia* [1973] 2 MLJ 149). As such the respondent is not entitled to damages for this injury and whatever evidence adduced before the Court below in proof of such injury will be disregarded as being irrelevant, regardless of its probative value and should be excluded entirely in the assessment of damages.

Partial loss of earnings

At the time of the accident the respondent was approximately 26 years of age (she was 30 years old when she gave evidence in the Court below on 28 September 1990. The accident took place on 28 January 1986), employed as a tailor in Jaya Garment Manufacturing Sdn. Bhd. As a tailor the respondent performed the task of cutting cloth ("saya kerja gunting kain dan bukan jahit kain" - page 40 of the Appeal Record, under examination in chief) and had to stand up. She was earning before the accident as tukang gunting kain RM580 to RM600 per month based on her KWSP contribution of RM54.75 per month (the then EPF Act 1951 (Revised 1982) Act 272, Third Schedule). Immediately after the accident she had to stop work and reported for duty in 1986 for a period of two days only before she stopped entirely. It was in evidence that the respondent married one of the partners of Jaya Garment Manufacturing Sdn. Bhd. (Mr. Tan Kian Joo) towards the end of 1986. And in 1987 the respondent

bore him a child. The respondent returned to work sometime in May 1988 in the same company and was paid initially RM7 per day and gradually increased to RM10 per day. The respondent was no longer employed as tukang gunting kain as the nature of this work required her to stand for long hours, something which she could not do as a result of the injury to her left knee. A copy of the respondent's salary slip for the years 1988 to 1989 was tendered and marked as (P3) which clearly shows her salary for the month of September 1988 to be RM213 per month. According to the respondent she was now employed as a leader in the same company earning RM13 per day. She drew a salary of RM300 without overtime. The salary register for the workers for May to December 1985 was tendered and marked as (P4). The trial Court gave an opportunity to the appellants to cross-examine the respondent on exhibits P3 and P4 but this was not taken up by the appellants.

The trial Court made a finding of fact that the respondent was earning RM600 per month at the time of the accident based on her KWSP contribution. Such finding of fact should not be disturbed by the appellate Court as the trial Court had the advantage of seeing and hearing the evidence of the respondent in the Court below and assessed the evidence in its correct perspective. This is not one of those rare cases where the appellate Court is justified in coming to a different conclusion from the trial Court. There is absolutely no reason to think that the trial Court had not taken advantage of seeing and hearing the respondent and weighing the evidence when she gave evidence in the Court below. For a good treatment on this subject see *Rashidin bin Partojo v. Frederick Kiai* [1976] 2 MLJ 214 FC, *Yahaya bin Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117 PC, *Hitam bin Abdullah & Anor. v. Kok Foong Yee* [1974] 1 MLJ 193 FC, *Uval & Anor. v. Zainal* [1970] 1 MLJ 74 FC, *Jeremiah v. Lee Yew Kwai* [1966] 1 MLJ 59 PC, *Ong Kim Hai v. Kusaini bin Surip* [1984] 2 MLJ 285 FC, *Siti Aisha binti Ibrahim v. Goh Cheng Hwai* [1982] 2 MLJ 124 FC and *Murugan v. Lew Chu Cheong* [1980] 2 MLJ 139 FC. Further the trial Court was satisfied that there was partial loss of earnings and having considered the evidence adduced awarded a sum of RM100 per month using a multiplier of 16 making it a grand total of RM19,200 for an award under this head.

Counsel for the appellants submitted that the trial Court erred in coming to such a conclusion as there was a failure to consider the totality of the respondent's evidence thus warranting the setting aside of the award under this head. In rebuttal, Counsel for the respondent submitted that the trial Court had applied the correct principle in making an award under this head.

I must at once say that Parliament in its wisdom employs mandatory language and has made its intention loud and clear in s. 28A(2)(d)(i) of the Civil Law Act 1956 in that "in assessing damages for loss of future earnings the Court shall take into account that in the case of a person who was of the age of thirty years or below at the time when hewas injured, the number of years' purchase shall be 16". The respondent was below 30 years of age at the time of the accident and thus the trial Court was absolutely right in awarding a multiplier of 16. There is nothing on record to justify reversing the award of the trial Court under this head.

In this event, I confirmed the following awards:

(1) Special damages (not disputed) at RM478;
(2) General damages:

(a) for permanent laxity of the posterior cruxiate ligament as well as the medial collateral ligament of the left knee at RM9,000;
(b) for total loss of earnings (pre-trial loss) at RM4,800 (Rm600 x 8 months);
(c) for partial loss of future earnings at RM19,200 (RM100 x 16 years purchase).

I disallowed the award for the permanent incapacity of the left little finger resulting in a permanent loss of sensation over the medial aspect as it was not averred in the statement of claim.

I also confirmed the awards on interests at 4% per annum for Special Damages and 8% per annum for General Damages (except future losses).

Costs to the respondent here and in the Court below.